

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BETTY HERDT, a single person;
REGINALD and LINDA REED,
husband and wife and the marital
community composed thereof; and
MICHAEL WRIGHT, a single person,
Respondents,

v.

DATSKO LYUBOV and JANE DOE
LYUBOV, husband and wife, and the
marital community composed thereof,
Defendants,

VLADIMIR LYFAR and YELENA
LYFAR, husband and wife, and the
marital community composed thereof,
Appellants.

No. 27182-0-III

Division Three

UNPUBLISHED OPINION

Sweeney, J. — This is a dispute among neighbors over both the right to and location of an easement. The trial court concluded on a motion for summary judgment that the respondents, owners of the dominant estates, had made a sufficient showing of an

express easement to warrant judgment. We conclude that the respondents have made a sufficient showing to warrant imposition of either a prescriptive easement or an implied easement as a matter of law. We also conclude that the respondents were not entitled to attorney fees under the trespass statute. We, then, affirm the judgment confirming an easement across the appellant's land and reverse the award of attorney fees.

FACTS

Betty Herdt, Michael Wright, Reginald and Linda Reed, and Vladimir and Yelena Lyfar all own property near Rambo Road in Spokane County, Washington. Ms. Herdt bought her property in 1980; the Reeds bought their property in 1984; the Lyfars bought their property in 2001; and Mr. Wright bought his property in 2007. Ms. Herdt, Mr. Wright, and the Reeds must cross the Lyfars' property to access their properties from Rambo Road.

Ms. Herdt's real estate contract grants her an easement across the Lyfars' property over an existing road:

TOGETHER WITH a 40 foot easement for ingress, egress and utilities over and across the existing road, commencing approximately 500 feet north of the Southeast corner of the Northeast quarter and heading in an easterly direction.

Clerk's Papers (CP) at 39. Mr. Wright's statutory warranty deed and the Reeds' real estate contract also grant them easements across the Lyfars' property over an existing

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road:

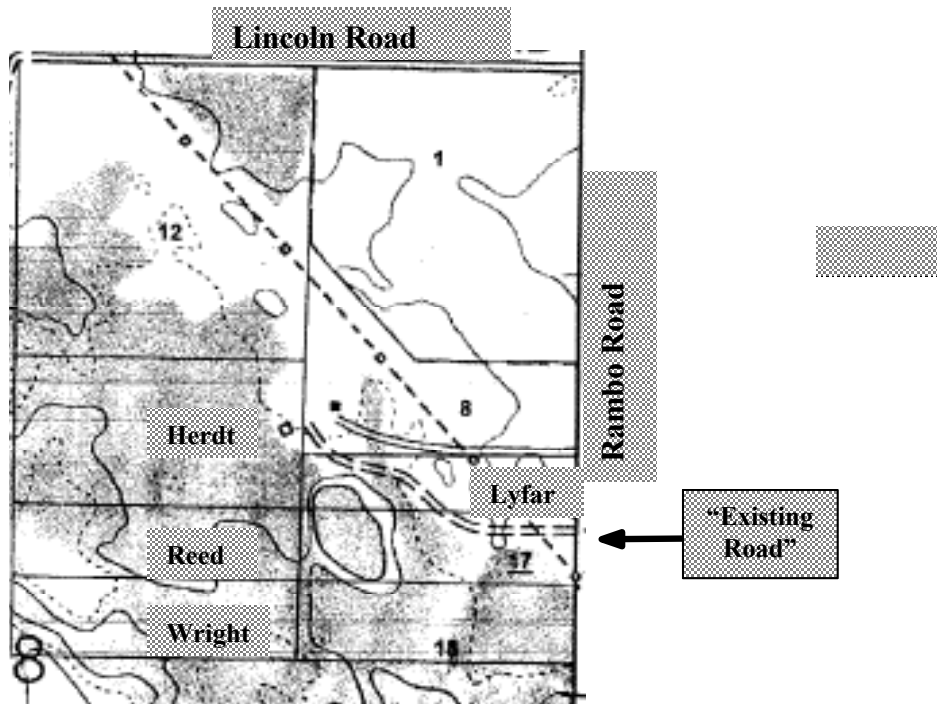
TOGETHER WITH a permanent non-exclusive easement for purposes of ingress, egress and utilities . . . over an existing road located in the Southern portion of the property legally described as a portion of the North Half of the Southeast Quarter of the Northeast Quarter lying South of the Northerly 1740 feet of the Northeast Quarter of said Section 28.

CP at 49; *see* CP at 42.

Ms. Herdt, Mr. Wright, and the Reeds offered two images, Figures 1 and 2, of the location of the “existing road”:

North

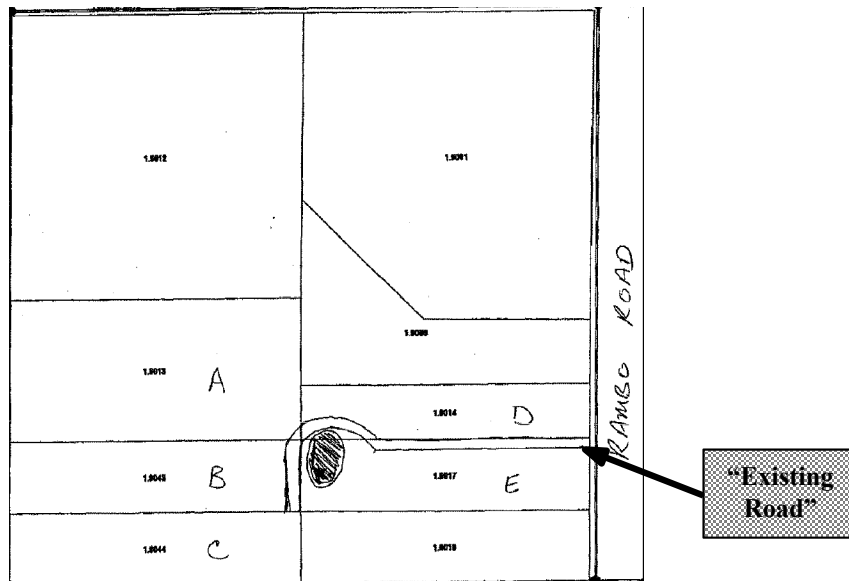
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South

Figure 1: US Geological Service Map, 1986 — CP at 223 (parties names added).

North



South

Figure 2: “Existing road’s” route according to Ms. Herdt, Mr. Wright, and the Reeds. CP at 23.

Ms. Herdt, Mr. Wright, and the Reeds have used the route in Figure 2 to

access their respective properties since the 1980s and have never asked the Lyfars for permission to do so. They cannot access their properties when this claimed route is blocked.

Ms. Herdt, Mr. Wright, and the Reeds sued the Lyfars for interfering with their easements by blocking the existing road with fences, rocks, and vehicles. They prayed for a declaratory judgment confirming their easement and an injunction prohibiting the Lyfars from interfering with that easement. Ms. Herdt also claimed that the Lyfars trespassed on her property by erecting a fence across the road on her property. She requested fees under the trespass statute. The Lyfars denied the allegations.

The trial court entered summary judgment against the Lyfars concluding that Ms. Herdt, Mr. Wright, and the Reeds have express easements across the Lyfars' property and the court permanently enjoined the Lyfars from obstructing access. The court also awarded attorney fees to Ms. Herdt, Mr. Wright, and the Reeds under the trespass statute, RCW 4.24.630.

The Lyfars appeal the judgment.

DISCUSSION

Issues of Fact—Location of the Easement

The Lyfars contend that issues of fact over the location of the easement remain and that the trial judge therefore erred by granting summary judgment for Ms. Herdt, Mr.

Wright, and the Reeds.

We review an order granting summary judgment de novo. *Seybold v. Neu*, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). Accordingly, we do not consider findings of fact and conclusions of law entered by the trial court. *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991). We instead view the evidence and any inferences from that evidence in the light most favorable to the nonmoving party, the Lyfars. *Miller v. Jacoby*, 145 Wn.2d 65, 71, 33 P.3d 68 (2001).

Summary judgment is only proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986).

An express grant of an easement is a conveyance of an interest in land. *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). Conveyances of land must contain a description of the land sufficient to locate it without recourse to oral testimony, and easements need only encumber a specific servient estate. *Id.* An express grant of an easement must, then, contain information sufficient to identify and locate the easement on a particular piece of property.

The deeds here not only describe the parcel of land over which the express easements run, the Lyfars' property, but they also describe the easement as following an "existing road" that passes through the Lyfars' property. The parties, however, dispute

the route of this “existing road” across the Lyfars’ property. Ms. Herdt, Mr. Wright, and the Reeds produced a drawing of the “existing road’s” route, which shows the road crossing the southern and western borders of the Lyfars’ property. *See* Figure 2. They argue that this drawing shows the “existing road” as they have always known it and used it. They, however, also offered a map (Figure 1) and findings by a professional consultant showing that the route of the “existing road” crosses the southern and northern edges of the Lyfars’ property, not the property’s western edge. CP at 217-24. The Lyfars argue that Figure 1 shows the actual location of the “existing road.” These conflicting illustrations of the “existing road’s” route suggest that the conveyances here did not sufficiently identify and locate the easements granted to Ms. Herdt, Mr. Wright, and the Reeds. So there may well be issues of fact over the location of the easement.

But that does not end our discussion.

Prescriptive Easement

The Lyfars also argue that issues of fact remain over whether Ms. Herdt, Mr. Wright, and the Reeds have satisfied the requirements for a prescriptive easement and so, for that reason, the trial judge also erred in granting summary judgment.

First, we may affirm the trial court’s grant of summary judgment if it is supported by any ground in the record, whether or not the trial court relied upon that ground.

LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

Ms. Herdt, Mr. Wright, and the Reeds argue that the undisputed evidence shows that they have prescriptive easements to use the route shown in Figure 2 across the Lyfars' property even if they are not entitled to an express easement for that route as a matter of law.

To prove the existence of a prescriptive easement, Ms. Herdt and the others must show: (1) use adverse to the right of the servient owner (the Lyfars); (2) open, notorious, continuous, and uninterrupted use for the entire 10-year prescriptive period; and (3) knowledge of such use by the Lyfars at a time when they were able to assert and enforce their rights. *Dunbar v. Heinrich*, 95 Wn.2d 20, 22, 622 P.2d 812 (1980).

The Lyfars contend only that Ms. Herdt, Mr. Wright, and the Reeds did not use the Lyfars' property adversely because Ms. Herdt, Mr. Wright, and the Reeds had permission to use the road. And use of an easement is not adverse if it is permissive. *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001). Permission may be express or implied. *Id.* Permission is implied in "any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence." *Roediger v. Cullen*, 26 Wn.2d 690, 707, 175 P.2d 669 (1946).

The Lyfars argue that Ms. Herdt's, Mr. Wright's, and the Reeds' use of the Lyfars' property "could as easily have been a matter of 'neighborly accommodation.'" Appellants' Br. at 14. And, while that may be true, we find nothing in this record to

support the assertion. Indeed, this record shows that Ms. Herdt, Mr. Wright, and the Reeds never asked the Lyfars for permission to use the route in Figure 2 across the Lyfars' property. We conclude then that the use here was not permissive.

The remaining two elements required to establish a prescriptive easement are not disputed. Ms. Herdt, Mr. Wright, and the Reeds have all regularly used the route across the Lyfars' property shown in Figure 2 for ingress and egress purposes without interruption from the 1980s until 2007 when the Lyfars blocked the road.

We conclude then that Ms. Herdt, Mr. Wright, and the Reeds used the Lyfars' property openly, notoriously, and continuously to access their properties and Rambo Road for more than 10 years. *Downie v. City of Renton*, 167 Wash. 374, 379, 9 P.2d 372 (1932). And such use creates a presumption and further support for the conclusion that the use was hostile. *Kunkel*, 106 Wn. App. at 602. This type of use also demonstrates that the Lyfars actually knew that their neighbors were using a particular route on their property for ingress and egress purposes. *Downie*, 167 Wash. at 379.

Ms. Herdt, Mr. Wright, and the Reeds have established a prescriptive easement over that portion of the Lyfars' property they have used for ingress and egress (Figure 2). We, therefore, affirm the court's summary judgment.

Implied Easement

We would also conclude based on this record that Ms. Herdt, Mr. Wright, and the

Reeds have satisfied the required elements to imply an easement to use the route in Figure 2 as a matter of law.

An implied easement can be impliedly granted or reserved. *Granite Beach Holdings, LLC v. Dep't of Natural Res.*, 103 Wn. App. 186, 196, 11 P.3d 847 (2000). Proof of an implied easement requires a showing of (1) former unity of title in a common grantor and subsequent separation, (2) a former apparent and continuous quasi easement for the benefit of one part of the estate to the detriment of another, and (3) necessity for the continuation of the easement. *McPhaden v. Scott*, 95 Wn. App. 431, 437, 975 P.2d 1033 (1999).

The Lyfars do not dispute that the first two elements of an implied easement have been satisfied. They argue only that Ms. Herdt has not shown that the easement she claims is reasonably necessary because she said that she has access to her property over another neighbor's land and because they have created an alternate route of access across their property.

But necessity is not dispositive of the question of implied easement. *Id.* It is primarily an aid in determining the presumed intent of the parties as disclosed by the extent and character of the use, the nature of the property, and the relation of the separated parts to each other. *Id.*

Moreover, the undisputed evidence here supports the notion that the easement is

necessary. A reasonable necessity requires a showing that the claimed easement affords convenient and comfortable access for vehicles. *Bailey v. Hennessey*, 112 Wash. 45, 51-52, 191 P. 863 (1920). But the use of a roadway is not necessary when the claimant could otherwise get access to a public road. *McPhaden*, 95 Wn. App. at 438-39. The record here shows that the only way Ms. Herdt, Mr. Wright, and the Reeds can access their properties by vehicle is by a route over the Lyfars' property. Ms. Herdt can access her property only by foot across another neighbor's property when she cannot drive over the Lyfars' property on the claimed easement. And the alternate roadway across the Lyfars' property, which the Lyfars created, does not provide access to Ms. Herdt's property. We would conclude on this record that Ms. Herdt, Mr. Wright, and the Reeds are entitled to an implied easement.

Attorney Fees

Finally, the Lyfars argue that the court erred by awarding attorney fees to Ms. Herdt, Mr. Wright, and the Reeds because they failed to show that the Lyfars entered upon and injured their land.

We review de novo whether a particular statute authorizes an award of attorney fees. *Schlener v. Allstate Ins. Co.*, 121 Wn. App. 384, 388, 88 P.3d 993 (2004).

The trial court here awarded Ms. Herdt, Mr. Wright, and the Reeds attorney fees under RCW 4.24.630. RCW 4.24.630(1) provides:

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts “wrongfully” if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party’s reasonable costs, including but not limited to investigative costs and reasonable attorneys’ fees and other litigation-related costs.

So Ms. Herdt, Mr. Wright, and the Reeds had to show that the Lyfars intentionally and unreasonably entered their land and committed acts of waste upon or injury to the land that resulted in some dollar amount of damages. *Colwell v. Etzell*, 119 Wn. App. 432, 442, 81 P.3d 895 (2003). “[W]ithout a showing of damages the claim has no value.” *Id.* The Lyfars essentially contend that Ms. Herdt, Mr. Wright, and the Reeds failed to produce proof of damages.

Mr. Wright and the Reeds did not produce proof of damage to their respective properties. Ms. Herdt claimed that the Lyfars’ interference with her easement forced her to use space heaters to heat her home instead of wood, causing her electric bills to double during the winter months. She produced billing statements for the additional amounts she paid for October 2007 through February 2008. The statute required Ms. Herdt to show

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damage to her land or the personal property or improvements attached to her land.

Womack v. Rardon, 133 Wn. App. 254, 261-62, 135 P.3d 542 (2006). We conclude that increased cost of heating her home is not such a showing.

Ms. Herdt also stated that “Vladimir Lyfar trespassed onto the Herdt Property in order to place two fences on the easement roadway at the point on the easement which is located on the Herdt Property.” CP at 255. She also produced photographs of those fences. But Ms. Herdt did not produce any proof of the damage this waste (the fences) caused to her land.

We conclude, then, that the court erred by awarding fees under the trespass statute.

We affirm the summary judgment and reverse the award of attorney fees.

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A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Sweeney, J.

Schultheis, C.J.

Brown, J.